

AN ORDINANCE 2006-03-30-0409

SELECTING HNTB, INC. TO PROVIDE PROFESSIONAL ENGINEERING SERVICES IN CONNECTION WITH THE DESIGN OF THE COMMERCIAL TRIBUTARY TO 6 MILE CREEK, PHASE I PROJECT LOCATED IN DISTRICTS 3 AND 4; AUTHORIZING THE NEGOTIATION AND EXECUTION OF A PROFESSIONAL ENGINEERING SERVICES AGREEMENT IN AN AMOUNT NOT TO EXCEED \$1,400,000.00; AND APPROPRIATING FUNDS FROM 2005 STORM WATER REVENUE BOND FUNDS.

* * * * *

WHEREAS, HNTB, Inc. submitted a proposal to provide the necessary professional engineering services in connection with the Commercial Tributary to 6 Mile Creek Phase I Project; and

WHEREAS, this contract provides for design of drainage improvements for the reconstruction of the Commercial Tributary to 6 Mile Creek; and

WHEREAS, approval of this Ordinance will be a continuation of City Council policy to complete previously approved 2005 Storm Water Revenue Bond funded projects; **NOW THEREFORE,**

BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF SAN ANTONIO:

SECTION 1. HNTB, Inc. is hereby selected to provide professional engineering services in connection with the Phase I Design of the Commercial Tributary to 6 Mile Creek.

SECTION 2. City staff is authorized and directed to commence negotiations with said firm to reach an agreement on a contract for such work at a fair and reasonable price not to exceed \$1,400,000.00

SECTION 3. If a contract can be negotiated in accordance with the terms of the standard-form contract for engineering services, and in accordance with the price provisions contained herein, the City Manager or her designee is authorized to execute such an agreement without further City Council action. A copy of such standard form contract appears in substantially the same form as Attachment I attached hereto and incorporated herein for all purposes. Should a contract be negotiated which varies from the standard terms, the contract must be considered through a subsequent ordinance. If so, City Council must approve the contract terms and insure that the compensation provided meets the legal requirements set out in Section 2254.004 of the Texas government Code.

SECTION 4. The following financial adjustments are hereby approved:

A. The amount of \$1,499,500.00 is appropriated in fund 48004000, 2005 Stormwater Revenue Bonds, WBS RB-00084-01-01-14 GL account 6102100 – Interfund Transfer out entitled Transfer to 23-00170-90-02. The amount of \$1,499,500.00 is authorized to be transferred to fund 48099000.

B. The budget in fund 48099000, Project Definition 23-00170, Commercial Tributary to 6 Mile Creek, Phase 1, shall be revised by increasing WBS element 23-00170-90-02 entitled Trf Fr RB-00084-01-01-14, GL account 6101100 – Interfund Transfer In, by the amount of \$1,499,500.00.

C. The amount of \$1,400,000.00 is appropriated in Fund 48099000, Project Definition 23-00170, Commercial Tributary to 6 Mile Creek, Phase 1, WBS element 23-00170-01-02, entitled Design Costs and is authorized to be encumbered and made payable to HNTB, Inc. in an amount not to exceed \$1,400,000.00.

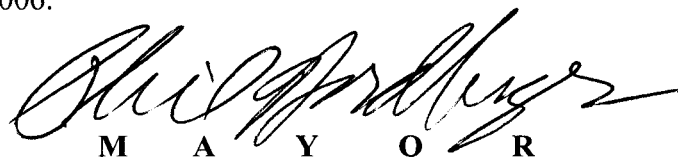
D. The budget in Fund 48099000, Project Definition 23-00170, Commercial Tributary to 6 Mile Creek, Phase 1, shall be revised by increasing WBS element 23-00170-01-04, entitled Capital Administrative Costs, G/L Acct 5402010, in the amount of \$98,000.00.

E. The budget in Fund 48099000, Project Definition 23-00170, Commercial Tributary to 6 Mile Creek, Phase 1, shall be revised by increasing WBS element 23-00170-04-01, entitled Enviromental Capital Administrative Costs, G/L Acct 5402010, in the amount of \$1,500.00.

SECTION 5. The financial allocations in this Ordinance are subject to approval by the Director of Finance, City of San Antonio. The Director of Finance may, subject to concurrence by the City Manager, or the City Manager's designee, correct allocation to specific SAP Fund Numbers, SAP Project Definitions, SAP WBS Elements, SAP Internal Orders, SAP Fund Centers, SAP Cost Centers, SAP Functional Areas, SAP Funds Reservation Document Numbers, and SAP GL Accounts as necessary to carry out the purpose of this Ordinance.

SECTION 6. This ordinance shall be effective on April 9, 2006.

PASSED AND APPROVED this the 30th day of March, 2006.



M A Y O R

PHIL HARDBERGER

ATTEST: 
CITY CLERK

APPROVED AS TO FORM: 

City Attorney

**PROFESSIONAL SERVICES AGREEMENT
FOR
ENGINEERING SERVICES**

STATE OF TEXAS

COUNTY OF BEXAR

AGREEMENT FOR

This AGREEMENT is made and entered into by and between the City of San Antonio (hereinafter referred to as "**CITY**"), a Texas Municipal Corporation acting by and through its City Manager, pursuant to Ordinance No. _____, passed and approved on the _____ day of _____, 2006 and HNTB Corporation, by and through its President, (hereinafter referred to as "**CONSULTANT**"), both of which may be referred to herein collectively as the "**PARTIES**".

IN CONSIDERATION of the mutual covenants, terms, conditions, privileges and obligations herein contained, **CITY** and **CONSULTANT** do hereby agree as follows:

I. DEFINITIONS

As used in this **AGREEMENT**, the following terms shall have meanings as set out below:

1.1 "Director" means the director of **CITY**'s Public Works Department, or the designated project manager identified by the Notice to Proceed.

1.2 "Project" means the capital improvement/construction development undertaking of **CITY** for which **CONSULTANT**'s design services, as stated in the Scope of Services, are to be provided pursuant to this **AGREEMENT**.

1.3 "Ab Initio" means from the beginning; from the first act; from the inception. *See Black's Law Dictionary, 5th Ed., © 1983.*

1.4 "Respondeat Superior" means let the master answer. This maxim means that a master is liable in certain cases for the wrongful acts of his servant, and a principal for those of his agent. *See Black's Law Dictionary, 5th Ed., © 1983.*

II. PERIOD OF SERVICE

This **AGREEMENT** shall take effect on the eleventh (11th) calendar day after it is approved by the San Antonio City Council or upon execution by both parties, whichever date is later, and

Attachment I

To Ordinance No. _____
Approved on March 30, 2006

continue in full force and effect for the period required for completion of the duties as set forth in the Scope of Services.

III. SCOPE OF SERVICES

3.1 **CONSULTANT** shall not commence work until **CONSULTANT** has been thoroughly briefed on the scope of Project, and has been notified in writing by Director to proceed. **CONSULTANT** shall provide a written summary of the scope meeting, including a description of the Project's scope and **CONSULTANT's** services required by said scope. Should the scope subsequently change, either party may request a review of the anticipated services, with an appropriate adjustment in fees; however, such adjustment cannot exceed the maximum allowed for additional services in Article V, Compensation, and cannot substantially alter the original scope of this **AGREEMENT**.

3.2 **CONSULTANT**, in consideration for the compensation herein provided, shall render the professional services necessary for the development of the Project to substantial completion, including plans and specifications, construction services and any special and general conditions and instruction to bidders as acceptable to Director.

3.3 **CONSULTANT** shall be represented by a professional engineer licensed to practice in the State of Texas at meetings of any official nature concerning the Project, including but not limited to scope meetings, review meetings and other meetings as may be required by the Project development process. All design submittals shall carry the signature and seal or, in the case of progress, or incomplete submittals, an appropriate disclaimer with the professional engineer's name and license number, with the date of the submittal adjacent thereto of a licensed professional engineer.

3.4 **CONSULTANT** shall complete the various phases of work listed in this Article III "Scope of Services", including all attachments hereto, in accordance with the Production Schedule in Attachment "B" of this **AGREEMENT**. Director may, in writing, extend any delivery dates contained in said Attachment "B", Production Schedule, as requested by **CONSULTANT**.

3.5 Upon acceptance and approval of the plans, reports or other producibles required for a phase of work, as set forth in the Scope of Services, Director shall authorize **CONSULTANT**, in writing, to proceed with the next phase of work.

3.6 The following is a list of all the documents that comprise the Scope of Services for this Project: Each such document is attached hereto and incorporated herein for all purposes. **CONSULTANT** agrees to perform all work required by this Scope of Services.

3.6.1 ATTACHMENT "A" (Scope of Services)

3.6.2 ATTACHMENT "B" – (Production Schedule)

3.6.3 ATTACHMENT "C" – (Consultant's Fee Proposal and SBEDA Participation Statement From Consultant's Interest Statement)

IV. COORDINATION WITH THE CITY

4.1 **CONSULTANT** shall hold periodic conferences with Director, so that the project, as developed, shall have the full benefit of **CITY's** experience and knowledge of existing needs and facilities and be consistent with its current policies and standards. No more than two conferences shall be held per phase, unless otherwise agreed to by Parties. **CITY** shall make available, for **CONSULTANT's** use, all existing plans, maps, field notes, statistics, computations, and other data in its possession relative to existing facilities and to this Project as may be requested by **CONSULTANT** at no cost to **CONSULTANT**.

4.2 Director shall act on behalf of **CITY** with respect to the work performed under this **AGREEMENT**. He shall have complete authority to transmit instructions, receive information, and interpret and define **CITY's** policies and decisions with respect to materials, equipment elements and systems pertinent to **CONSULTANT's** services.

4.3 **CITY** shall provide written notice to the **CONSULTANT** of any errors or omissions discovered in the **CONSULTANT's** services, or performance, or of any development that affects the scope or timing of **CONSULTANT's** services.

4.4 **CONSULTANT** shall complete all applications and furnish all required data, as set forth in the Scope of Services, compiled by **CONSULTANT** for **CITY's** use in obtaining any permits or approvals from governmental authorities having jurisdiction over the Project as may be necessary for completion of the Project. **CONSULTANT** shall not be obligated to develop additional data, prepare extensive reports or appear at hearings in order to obtain said permits or approvals, unless compensated therefore as provided in Article V, entitled "Compensation".

V. COMPENSATION

5.1 For and in consideration of the services to be rendered by **CONSULTANT**, **CITY** shall pay **CONSULTANT** the fee set forth in this Article V, Compensation. **CITY** may request **CONSULTANT** to perform an engineering study to refine the Project scope. Payment for such a study will be negotiated in accordance with Article V, Section 5.5 herein.

5.2 Nothing contained in this **AGREEMENT** shall require **CITY** to pay for any unsatisfactory work, as determined by Director, or for work that is not in compliance with the terms of this **AGREEMENT**. **CITY** shall not be required to make any payments to **CONSULTANT** at any time **CONSULTANT** is in default under this **AGREEMENT**.

5.3 BASIS FOR COMPENSATION

A. The total fee for **CONSULTANT's** work as defined in the Scope of Services shall be determined as follows:

- (1) Non-Principal – hourly rate shall be base salary times a multiplier of 3.15.
- (2) Principal – hourly rate set forth in 5.5(D) with a stated maximum not be exceeded.
- (3) Reimbursement of non-labor expenses and **CITY** directed subcontract expenses at invoice cost plus a 5% service charge.
- (4) The maximum compensation shall not exceed \$200,000 without prior written notice from the **CITY**.

B. **CONSULTANT** may submit invoices for partial payment prior to submittal of review documents as outlined below. **CONSULTANT** must submit a written progress report detailing work performed for the billing period reflected in the invoice. A partial payment made must be in proportion to the work performed as reflected in the report and approved by Director. Partial payments shall be payable no later than thirty (30) days following acceptance by Director. Partial payments shall not exceed 70% of each phase prior to acceptance of that phase by **CITY**. The balance due for that phase will be paid upon acceptance of the phase by **CITY**. **CITY** shall have no more than 45 days from the date of submittal within which to review and approve or reject said phase. If no action has been taken by Director at the expiration of the 45 day review period, said phase shall be deemed approved. If any phases are authorized to be omitted then the percentage allocation will be applied to the next appropriate phase. Payments shall be made to the **CONSULTANT** in accordance with the following:

- 1) PRELIMINARY PHASE "A": 30% of the total fee due **CONSULTANT** shall be payable no later than thirty (30) days following acceptance of the Preliminary Phase "A" work by **CITY**;
- 2) PRELIMINARY PHASE "B": 30% of the total fee due **CONSULTANT** shall be payable no later than thirty (30) days following acceptance of the Preliminary Phase "B" work by **CITY**.
- 3) FINAL DESIGN: 20% of the total fee due **CONSULTANT** shall be payable no later than thirty (30) days following acceptance of the Final Design by **CITY**.
- 4) BID PHASE & DOCUMENTS: 5% of the total fee due **CONSULTANT** shall be payable no later than thirty (30) days following acceptance of the Bid Documents by **CITY**.
- 5) CONSTRUCTION PHASE: 15% of the total fee due **CONSULTANT** shall be payable by **CITY** in monthly installments in accordance with the percentage of construction completed as determine by Director in his sole discretion.

5.4 MODIFICATIONS - **CONSULTANT** and **CITY** acknowledge the fact that the base fee as determined in section 5.3(A) above has been established predicated upon the total estimated costs of services to be rendered under the **AGREEMENT**. For additional services, compensation shall be subject to renegotiations in accordance with section 5.5 below.

5.5 COMPENSATION FOR ADDITIONAL PROFESSIONAL SERVICES

CONSULTANT may be required to perform the additional services listed in 5.5(B) below, subject to appropriations having been made therefore, in connection with this **AGREEMENT**. Should **CONSULTANT** be directed in writing by Director to perform these services, compensation shall be paid by **CITY** to **CONSULTANT** as authorized in writing by Director, as follows:

A. The basis for compensation for additional services may be in one or more of the following forms:

- (1) Rate for testimony of principals to be negotiated.

- (2) Non-Principal - Salary cost times a multiplier of 2.5 with a stated maximum not to be exceeded.
- (3) Principal – hourly rate set forth in 5.5(D) herein with a stated maximum not to be exceeded.
- (4) Reimbursement of non-labor expenses and **CITY** directed subcontract expenses at invoice cost plus a 15% service charge.
- (5) Lump sum per item of work to be negotiated.
- (6) Lump sum to be negotiated.

B. Additional services include, but are not limited to the following:

- (1) Assistance to **CITY** as an expert witness in any litigation with third parties, arising from the development or construction of the Project including the preparation of engineering data and reports.
- (2) Preparation of plats and field notes for acquisition of property required for the construction of the project.
- (3) Site visits for ROW pin locating and/or setting for utility companies.
- (4) Preparation of applications and supporting documents for governmental grants, loans, or advances in connection with the Project.
- (5) Preparation or review of environmental assessments and impact statements.
- (6) Review and evaluation of the effect on design requirements of the Project of any assessments, statements, or documents prepared by others.
- (7) Assistance in obtaining approvals of authorities having jurisdiction over the anticipated environmental impact of the Project.
- (8) Revising previously accepted studies, reports, design documents or **AGREEMENT** documents when such revisions are required by changes in laws, rules, regulations, ordinances, codes, standards, design criteria or orders enacted subsequent to the preparation of such studies, reports, and documents, or are due to causes beyond **CONSULTANT's** control.
- (9) Preparation of feasibility studies not required in the base **AGREEMENT**.
- (10) Detailed quantity surveys of materials, equipment and labor during or after construction phase.
- (11) Services in making revisions to Drawings and Specifications occasioned by the acceptance of substitutions by **CITY** proposed by the **CONTRACTOR** retained to construct the designed Project; and services after the award of each **CONTRACT** in evaluating and determining the acceptability of an unreasonable and excessive number of substitutions proposed by **CONTRACTOR**.
- (12) Services after the completion of the Construction Phase, such as inspections during any guarantee period and reporting observed discrepancies under guarantee called for in any contract for the Project.
- (13) Additional copies of reports, drawings and specifications over the number specified in the base **AGREEMENT**.
- (14) Preparation of all documents dealing with 404 permits, highway permits, and railroad agreements.
- (15) Preparation of driveway plats.
- (16) Obtaining Right of Entry Agreements on behalf of **CITY** for driveway penetrations.

- (17) Detailed measurements and surveys for exploration for utilities, if required.
- (18) Preparation of record drawing after completion of work by CONTRACTOR.
- (19) Actual performance of test borings and other soil or foundation investigations and related analysis.
- (20) Tree surveys.

C. Salary Cost - Salary cost is defined as the cost of salaries of engineers, draftsmen, stenographers, surveymen, clerks, laborers, etc. for time directly chargeable to the Project, plus customary and statutory benefits including but not limited to social security contributions, unemployment, excise and payroll taxes, employment compensation insurance, retirement benefits, medical and insurance benefits, sick leave, vacation and holiday pay applicable thereto.

- a. The amount of customary and statutory benefits of all personnel other than Principals of the Consulting Firm will be considered equal to _____% of salaries or wages.

D. Principals of the Consulting Firm - For the purpose of this provision, the Principals of the Consulting Firm and their total hourly charge will be as follows, except as stated previously for testimony as expert witnesses:

<u>Principal Name</u>	<u>Hourly Charge</u>
<u>Thomas D. Ellis, P.E.</u>	_____
_____	_____

5.6 MAXIMUM COMPENSATION FOR ADDITIONAL SERVICES – Total cumulative costs for the additional services listed in Section 5.5 or in Article VI below shall not exceed that amount appropriated by **CITY** as set forth in the ordinance authorizing this **AGREEMENT**, without prior authorization of the San Antonio City Council by passage of an ordinance therefore.

VI. REVISIONS TO DRAWINGS AND SPECIFICATIONS

CONSULTANT shall provide, at no expense to **CITY**, reasonable minor revisions to any phase, whether previously approved and accepted, as may be required to satisfy the scope of services established by this **AGREEMENT**. Approval of any phase constitutes **CITY's** acceptance of the design presented. After acceptance of each phase of the Project, any revisions, additions, or modifications made at **CITY's** request which constitute a change in the Scope of Services shall be subject to additional compensation to **CONSULTANT** as agreed upon by **CITY**, subject to Article V, Section 5.6 above.

VII. OWNERSHIP OF DOCUMENTS

7.1 **CONSULTANT** acknowledges and agrees that **CITY** shall own exclusively any and all information in whatsoever form and character produced and/or maintained in accordance with, pursuant to, or as a result of this **AGREEMENT** and shall be used as **CITY** desires and shall be delivered to **CITY** at no additional cost to **CITY** upon request or completion or termination of this **AGREEMENT** without restriction on future use.

7.2 **CONSULTANT** agrees and covenants to protect any and all proprietary rights of **CITY** in any materials provided to **CONSULTANT**. Such protection of proprietary rights by **CONSULTANT** shall include, but not be limited to, the inclusion in any copy intended for publication of copyright mark reserving all rights to **CITY**. Additionally, any materials provided to **CONSULTANT** by **CITY** shall not be released to any third party without the consent of **CITY** and shall be returned intact to **CITY** upon completion or termination of this **AGREEMENT**.

7.3 **CONSULTANT** hereby assigns all statutory and common law copyrights to any copyrightable work that in part or in whole was produced from this **AGREEMENT** to **CITY**, including all moral rights. No reports, maps, documents or other copyrightable works produced in whole or in part by this **AGREEMENT** shall be subject of an application for copyright by **CONSULTANT**. All reports, maps, project logos, drawings or other copyrightable work produced under this **AGREEMENT** shall become the property of **CITY** (excluding any instrument of services, unless otherwise specified herein). **CONSULTANT** shall, at its expense, defend all suits or proceedings instituted against **CITY** and pay any award of damages or loss resulting from an injunction, against **CITY**, insofar as the same are based on any claim that materials or work provided under this **AGREEMENT** constitute an infringement of any patent, trade secret, trademark, copyright or other intellectual property rights.

7.4 **CONSULTANT** may make copies of any and all documents and items for its files. **CONSULTANT** shall have no liability for changes made to or use of the drawings, specifications and other documents by other engineers, or other persons, subsequent to the completion of the Project. **CITY** shall require that any such change or other use shall be appropriately marked to reflect what was changed or modified.

7.5 Copies of documents that may be relied upon by **CITY** are limited to the printed copies (also known as hard copies) that are sealed and signed by **CONSULTANT**. Files in electronic media format of text, data, graphics, or other types that are furnished by **CONSULTANT** to **CITY** are only for convenience of **CITY**. Any conclusion or information obtained or derived from such electronic files will be at the user's sole risk.

VIII. TERMINATION AND/OR SUSPENSION OF WORK

8.1 For purposes of this **AGREEMENT**, termination of this **AGREEMENT** shall mean termination by expiration of the **AGREEMENT** term or earlier termination pursuant to any of the provisions hereof.

8.2 Termination Without Cause.

8.2.1 This **AGREEMENT** may be terminated by either party upon written notice in accordance with Article XVIII, Notice. Such notice must specify an effective date of termination, which shall be not less than thirty (30) calendar days after the date of receipt of the notice by the other Party. If the notice does not specify a date of termination, the effective date of termination shall be thirty (30) calendar days after receipt of the notice by the other Party.

8.2.2 This **AGREEMENT** may be terminated by **CITY** prior to Director giving **CONSULTANT** written notice to proceed pursuant to Article III, Section 3.1, should Director, at his sole discretion, determine that it is not in **CITY's** best interest to proceed with this **AGREEMENT**. Such notice shall be provided in accordance with Article XVIII, Notice and shall be effective upon delivery by **CITY** in accordance with Article XVIII.

8.2.3 **CITY** shall equitably compensate **CONSULTANT** in accordance with the terms of this **AGREEMENT** for the Services properly performed prior to the effective date of termination, following inspection and acceptance of same by **CITY**. **CONSULTANT** shall not, however, be entitled to lost or anticipated profits should **CITY** choose to exercise its option to terminate.

8.3 Defaults With Opportunity for Cure.

Should **CONSULTANT** fail to provide the required designs and/or documents required by Article III, Scope of Services by the due dates establish in Article III, Attachment B, Production Schedule, in acceptable form, as indicated in said Scope of Services as approved by Director, same shall be considered a default. However, Parties agree that no default shall be considered to occur where **CONSULTANT's** failure to provide the designs and/or documents is directly caused by the actions of **CITY**. **CITY** shall deliver written notice of said default specifying such matter(s) in default. **CONSULTANT** shall have ten (10) days after receipt of the written notice, in accordance with Article XVIII, Notice, to cure such default. If **CONSULTANT** fails to cure the default within such ten-day cure period, **CITY** shall have the right, without further notice, to terminate this **AGREEMENT** in whole or in part as **CITY** deems appropriate, and to **CONTRACT** with another contractor to complete the work required in this **AGREEMENT**. **CITY** shall also have the right to offset the cost of said new **CONTRACT** with a new contractor against **CONSULTANT's** future or unpaid invoice(s), subject to the duty on the part of **CITY** to mitigate its losses to the extent required by law.

8.4 **Termination For Cause.** Upon written notice, **CITY** may terminate this **AGREEMENT** upon the occurrence of one (1) or more of the following events, each of which shall constitute an Event for Cause under this **AGREEMENT**:

8.4.1 **CONSULTANT** makes or allows to be made any material misrepresentation or provides any materially misleading information in connection with this **AGREEMENT**, including, but not limited to, **CONSULTANT's** Interest Statement, or any covenant, obligation, term or condition contained in this **AGREEMENT**; or

8.4.2 **CONSULTANT** violates or fails to perform any covenant, provision, obligation, term or condition of a material nature contained in this **AGREEMENT**, except those events of default for which an opportunity to cure is provided herein; however, if such default as provided in Section 8.3, Defaults with Opportunity for Cure, exceeds the following, same shall be considered an Event for Cause, subject to the remedies as provided herein:

(A) **CONSULTANT** fails to cure a default listed in Section 8.3 within the time period required for cure; or

(B) **CONSULTANT** is in default as provided in Section 8.3 on more than one occasion in any consecutive twelve (12) month period.

8.4.3 **CONSULTANT** attempts to assign this **AGREEMENT** contrary to the terms hereof; or experiences a change in ownership interest greater than thirty percent (30%), or control of its business entity; or

8.4.4 **CONSULTANT** ceases to do business as a going concern; makes an assignment for the benefit of creditors; admits in writing its inability to pay debts as they become due; files a petition in bankruptcy or has an involuntary bankruptcy petition filed against it (except in connection with a reorganization under which the business of such party is continued and performance of all its obligations under this **AGREEMENT** shall continue); or if a receiver, trustee or liquidator is appointed for it or any substantial part of **CONSULTANT's** assets or properties; or

8.4.5 **CONSULTANT** fails to comply in any respect with the insurance requirements set forth in this **AGREEMENT**; or

8.4.6 **CONSULTANT** violates any rule, regulation or law by which **CONSULTANT** is bound or shall be bound while and in performing the services required under this **AGREEMENT**.

8.5 **Termination By Law.** If any state or federal law or regulation is enacted or promulgated which prohibits the performance of any of the duties herein, or, if any law is interpreted to prohibit such performance, this **AGREEMENT** shall automatically terminate as of the effective date of such prohibition.

8.6 **Effect of Termination.** Notwithstanding Section 8.3, Defaults with Opportunity for Cure, upon a decision to terminate by **CITY**, written notice of such shall be immediately provided to **CONSULTANT** specifying the effective date of termination, notice of which shall be given in accordance with Article XVIII, Notice.

8.6.1 Regardless of how this **AGREEMENT** is terminated, and subject to 8.6.2, **CONSULTANT** shall affect an orderly transfer to **CITY** or to such person(s) or firm(s) as the **CITY** may designate, at no additional cost to **CITY**, all completed or partially completed specifications and reproducibles of all completed or partially completed designs and plans prepared pursuant to this **AGREEMENT**, documents, papers, records, charts,

reports, and any other materials or information produced as a result of or pertaining to the services rendered by **CONSULTANT**, or provided to **CONSULTANT**, hereunder in accordance with Article VII, Ownership of Documents. Any record transfer shall be completed within thirty (30) calendar days of the termination date and shall be completed at **CONSULTANT**'s sole cost and expense. Payment of compensation due or to become due to **CONSULTANT** is conditioned upon delivery of all such documents.

8.6.2 Within forty-five (45) calendar days of the effective date of completion, or termination or expiration of this **AGREEMENT**, **CONSULTANT** shall submit to **CITY** its claims, in detail, for the monies owed by **CITY** for services performed under this **AGREEMENT** through the effective date of termination. Failure by **CONSULTANT** to submit its claims within said forty-five (45) calendar days shall negate any liability on the part of **CITY** and constitute a **Waiver** by **CONSULTANT** of any and all right or claims to collect moneys that **CONSULTANT** may rightfully be otherwise entitled to for services performed pursuant to this **AGREEMENT**.

8.6.3 Upon the effective date of expiration or termination of this **AGREEMENT**, **CONSULTANT** shall cease all operations of work being performed by **CONSULTANT** or any of its subcontractors pursuant to this **AGREEMENT**.

8.6.4 **Termination not sole remedy.** In no event shall **CITY**'s action of terminating this **AGREEMENT**, whether for cause or otherwise, be deemed an election of **CITY**'s remedies, nor shall such termination limit, in any way, at law or at equity, **CITY**'s right to seek damages from or otherwise pursue **CONSULTANT** for any default hereunder or other action.

8.7 Right of **CITY** to Suspend Giving Rise to Right of **CONSULTANT** to Terminate.

8.7.1 **CITY** may suspend this **AGREEMENT** at the end of any phase for the convenience of **CITY** by issuing a signed, written notice of suspension (citing this paragraph) as provided in Article XVIII, Notice, which shall outline the reasons for the suspension and the duration of the suspension. However, it is understood and agreed by the Parties that the total number of days of suspension as reflected in said notice is not guaranteed, and in fact, may be shorter or longer. Such suspension shall take effect upon the date set forth in the notice, or if no date is set forth, immediately upon **CONSULTANT**'s receipt of said notice.

8.7.2 **CONSULTANT** may terminate this **AGREEMENT** in the event such suspension exceeds one hundred and twenty (120) calendar days. **CONSULTANT** may exercise this right to terminate by issuing a signed, written notice of termination, in accordance with Article XVIII, Notice, (citing this paragraph) to **CITY** after the expiration of one hundred and twenty (120) calendar days from the effective date of the suspension. Termination pursuant to this paragraph shall become effective immediately upon receipt of said written notice by **CITY**.

8.8 Procedures for **CONSULTANT** to follow upon Receipt of Notice of Suspension.

- 8.8.1 Upon receipt of written notice of suspension, **CONSULTANT** shall, unless the notice otherwise directs, immediately discontinue all services in connection with the performance of this agreement and cancel all existing orders and contracts.
- 8.8.2 **CONSULTANT** shall prepare a statement showing in detail the services performed under this agreement prior to the effective date of suspension.
- 8.8.3 All completed or partially completed designs, plans and specifications prepared under this agreement prior to the effective date of suspension shall be prepared for possible delivery to **CITY** but shall be retained by **CONSULTANT** until such time as **CONSULTANT** may exercise the right to terminate.
- 8.8.4 In the event that **CONSULTANT** exercises the right to terminate after the suspension date as provided by this Article, within thirty (30) calendar days after receipt by **CITY** of **CONSULTANT**'s notice of termination, **CONSULTANT** shall submit the above referenced statement showing in detail the services performed under this agreement prior to the effective date of suspension. Nothing in this section 8.8.4 shall prevent **CONSULTANT** from submitting invoices for partial payments for work performed prior to the termination date as provided by Article V, Compensation.
- 8.8.5 Additionally, any documents prepared in association with this **AGREEMENT** shall be delivered to **CITY** by **CONSULTANT**, as a pre-condition to final payment, within thirty (30) calendar days after receipt by **CITY** of **CONSULTANT**'s notice of termination.
- 8.8.6 Upon the above conditions being met, **CITY** shall pay **CONSULTANT** that proportion of the prescribed fee which the services actually performed under this agreement bear to the total services called for under this agreement, less previous payments of the fee.
- 8.8.7 **CITY**, as a public entity, has a duty to document the expenditure of public funds. **CONSULTANT** acknowledges this duty on the part of **CITY**. To this end, **CONSULTANT** understands that failure of **CONSULTANT** to substantially comply with the submittal of the statements and documents as required herein shall constitute a waiver by **CONSULTANT** of any portion of the fee for which **CONSULTANT** did not supply such necessary statements and/or documents.

IX. INSURANCE REQUIREMENTS

9.1 Prior to the commencement of any work under this **AGREEMENT**, **CONSULTANT** shall furnish an original completed Certificate of Insurance to **CITY**'s Public Works Department and **CITY**'s Risk Management Division, and shall be clearly labeled "**Commercial Tributary to 6 Mile Creek to IH 35**", which shall be completed by an agent authorized to bind the named underwriter(s) and their company to the coverage, limits, and termination provisions shown thereon, containing all required information referenced or indicated thereon. The original

certificate must have the agent's original signature, including the signer's company affiliation, title and phone number, and be mailed directly from the agent to **CITY**. **CITY** shall have no duty to pay or perform under this **AGREEMENT** until such certificate shall have been delivered to **CITY's** Public Works Department and no officer or employee shall have authority to waive this requirement.

9.2 **CONSULTANT's** financial integrity is of interest to **CITY**, therefore, subject to **CONSULTANT's** right to maintain reasonable deductibles in such amounts as are approved by **CITY**, **CONSULTANT** shall obtain and maintain in full force and effect for the duration of this **AGREEMENT**, and any extension hereof, at **CONSULTANT's** sole expense, insurance coverage written on an occurrence basis, except for professional liability, by companies authorized, approved or admitted to do business in the State of Texas and rated A- or better by A.M. Best Company and/or otherwise acceptable to **CITY**, in the following types and amounts:

<u>TYPE</u>	<u>MINIMUM AMOUNTS</u>
1. Workers' Compensation	Statutory
2. Employers' Liability	\$500,000/\$500,000/\$500,000
3. Commercial General (public) Liability Insurance to include coverage for the following: a. Premises/Operations b. Independent Contractors c. Products/completed operations d. Personal Injury e. Contractual liability	Combined Single Limit for Bodily Injury and Property Damage of \$1,000,000 per; General Aggregate limit of \$2,000,000 occurrence or its equivalent in umbrella or excess liability coverage
4. Business Automobile Liability a. Owned/Leased Vehicles b. Non-Owned Vehicles c. Hired Vehicles	Combined Single Limit for Bodily Injury and Property Damage of \$1,000,000 per occurrence
5. Professional Liability (Claims made form)	\$1,000,000 per claim to pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages by reason of any negligent act, malpractice, error or omission in professional services.

9.3 **CITY** shall be entitled, upon request and without expense, to receive copies of the policies and all endorsements thereto as they apply to the limits required by **CITY**. **CONSULTANT** shall be required to comply with any such requests and shall submit a copy of the replacement certificate of insurance to **CITY** at the address provided in Article IX herein within 10 days of the requested change.

9.4 **CONSULTANT** agrees that with respect to the above required insurance, all insurance contracts and Certificate(s) of Insurance will contain the following required provisions:

- Name **CITY** and its officers, employees, and elected representatives as additional insureds as respects operations and activities of, or on behalf of, the named insured performed under contract with **CITY**, with the exception of the workers' compensation and professional liability policies;
- Provide for an endorsement that the "other insurance" clause shall not apply to the City of San Antonio where **CITY** is an additional insured shown on the policy;
- Workers' compensation and employers' liability policy will provide a waiver of subrogation in favor of **CITY**.

9.5 When there is a cancellation, non-renewal or material change in coverage which is not made pursuant to a request by **CITY**, **CONSULTANT** shall notify **CITY** of such and shall give such notices not less than thirty (30) days prior to the change, if **CONSULTANT** knows of said change in advance, or ten (10) days notice after the change, if the **CONSULTANT** did not know of the change in advance. In the event of cancellation or non-renewal, such notice must be accompanied by a replacement Certificate of Insurance. All notices under this Article shall be given to **CITY** at the following addresses:

City of San Antonio
Public Works Department – Capital Programs
P.O. Box 839966
San Antonio, Texas 78283-3966

9.6 If **CONSULTANT** fails to maintain the aforementioned insurance, or fails to secure and maintain the aforementioned endorsements, **CITY** may obtain such insurance, and deduct and retain the amount of the premiums for such insurance from any sums due under the AGREEMENT; however, procuring of said insurance by **CITY** is an alternative to other remedies **CITY** may have, and is not the exclusive remedy for failure of **CONSULTANT** to maintain said insurance or secure such endorsement. In addition to any other remedies **CITY** may have upon **CONSULTANT's** failure to provide and maintain any insurance or policy endorsements to the extent and within the time herein required, **CITY** shall have the right to order **CONSULTANT** to stop work hereunder, and/or withhold any payment(s) which become due to **CONSULTANT** hereunder until **CONSULTANT** demonstrates compliance with the requirements hereof. A stop work order given to **CONSULTANT** by **CITY** in accordance with this Article shall not constitute a Suspension of Work pursuant to Article VIII, Section 8.7.

9.7 Nothing herein contained shall be construed as limiting in any way the extent to which **CONSULTANT** may be held responsible for payments of damages to persons or property resulting from **CONSULTANT's** or its subcontractors' performance of the work covered under this AGREEMENT.

9.8 It is agreed that **CONSULTANT's** insurance shall be deemed primary with respect to any

insurance or self insurance carried by **CITY** of San Antonio for liability arising out of operations under this **AGREEMENT**.

X. INDEMNIFICATION

10.1 CONSULTANT, whose work product is the subject of this **AGREEMENT** for engineering services, agrees to **INDEMNIFY AND HOLD CITY, ITS ELECTED OFFICIALS, OFFICERS AND EMPLOYEES HARMLESS** against any and all claims, lawsuits, judgments, cost, liens, losses, expenses, fees (including attorney's fees and costs of defense), proceedings, actions, demands, causes of action, liability and suits of any kind and nature, including but not limited to, personal injury (including death), property damage, or other harm for which recovery of damages is sought that may **ARISE OUT OF OR BE OCCASIONED OR CAUSED BY CONSULTANT'S NEGLIGENT ACT, ERROR, OR OMISSION OF CONSULTANT, ANY AGENT, OFFICER, DIRECTOR, REPRESENTATIVE, EMPLOYEE, CONSULTANT OR SUBCONSULTANT OF CONSULTANT, AND THEIR RESPECTIVE OFFICERS, AGENTS, EMPLOYEES, DIRECTORS AND REPRESENTATIVES** while in the exercise of performance of the rights or duties under this **AGREEMENT**. The indemnity provided for in this paragraph shall not apply to any liability resulting from the negligence of **CITY**, its officers or employees, in instances where such negligence causes personal injury, death, or property damage. **IN THE EVENT CONSULTANT AND CITY ARE FOUND JOINTLY LIABLE BY A COURT OF COMPETENT JURISDICTION, LIABILITY SHALL BE APPORTIONED COMPARATIVELY IN ACCORDANCE WITH THE LAWS OF THE STATE OF TEXAS, WITHOUT, HOWEVER, WAIVING ANY GOVERNMENTAL IMMUNITY AVAILABLE TO CITY UNDER TEXAS LAW AND WITHOUT WAIVING ANY DEFENSES OF THE PARTIES UNDER TEXAS LAW.**

10.2 CONSULTANT shall advise **CITY** in writing within 24 hours of any claim or demand against **CITY** or **CONSULTANT** known to **CONSULTANT** related to or arising out of **CONSULTANT's** activities under this **AGREEMENT**.

10.3 The provisions of this section are solely for the benefit of the parties hereto and not intended to create or grant any rights, contractual or otherwise, to any other person or entity.

XI. ENGINEER'S LIABILITY

11.1 Acceptance of the final plans by **CITY** shall not constitute nor be deemed a release of the responsibility and liability of **CONSULTANT**, its employees, associates, agents or subcontractors for the accuracy and competency of their designs, working drawings, specifications or other documents and work; nor shall such acceptance be deemed an assumption of responsibility or liability by **CITY** for any defect in the designs, working drawings, specifications or other documents and work prepared by said **CONSULTANT**, its employees, subcontractors, and agents.

11.2 Standard of Care: Services provided by **CONSULTANT** under this **AGREEMENT** will be performed in a manner consistent with that degree of care and skill ordinarily exercised by members of the same profession currently practicing under similar circumstances.

XII. LICENSING

CONSULTANT shall utilize qualified personnel to complete the work to be performed under this **AGREEMENT**, and all work performed under this **AGREEMENT** is to be executed under the direct supervision of a licensed professional engineer as required by state law. Persons retained to perform work pursuant to this **AGREEMENT** shall be the employees or subcontractors of **CONSULTANT**. **CONSULTANT** or its subcontractors shall perform all necessary work.

XIII. ASSIGNMENT OF RIGHTS OR DUTIES

13.1 By entering into this **AGREEMENT**, **CITY** has approved the use of any subcontractors identified in **CONSULTANT's** Interest Statement. No further approval shall be needed for **CONSULTANT** to use such subcontractors as are identified in **CONSULTANT's** Interest Statement.

13.2 Except as otherwise required herein, **CONSULTANT** may not sell, assign, pledge, transfer or convey any interest in this **AGREEMENT** nor delegate the performance of any duties hereunder, by transfer, by subcontracting or any other means, without the consent of **CITY**. Actual engineering services, those required by law to be performed by a licensed engineer, or services to be performed which, by law, require the supervision and approval of a licensed engineer, may only be subcontracted upon the written approval of the San Antonio City Council, by approval and passage of an ordinance therefore. Any other services to be performed under this **AGREEMENT** may be subcontracted upon the written approval of Director.

13.3 As a condition of consent, if same is given, **CONSULTANT** shall remain liable for completion of the services outlined in this **AGREEMENT** in the event of default by the successor consultant, assignee, transferee or subcontractor. Any references in this **AGREEMENT** to an assignee, transferee, or subcontractor, indicate only such an entity as has been approved by **CITY** in accordance with this Article.

13.4 Any attempt to assign, transfer, pledge, convey or otherwise dispose of any part of, or all of its right, title, interest or duties to or under this **AGREEMENT**, without said written approval, shall be void ab initio and shall confer no rights upon any third person. Should **CONSULTANT** assign, transfer, convey or otherwise dispose of any part of, or all of its right, title or interest or duties to or under this **AGREEMENT**, **CITY** may, at its option, terminate this **AGREEMENT** in accordance with Article VIII, Termination, and all rights, titles and interest of **CONSULTANT** shall thereupon cease and terminate, notwithstanding any other remedy available to **CITY** under this **AGREEMENT**. The violation of this provision by **CONSULTANT** shall in no event release **CONSULTANT** from any obligation under the terms of this **AGREEMENT**, nor shall it relieve or release **CONSULTANT** from the payment of any damages to **CITY**, which **CITY** sustains as a result of such violation.

13.5 **CONSULTANT** agrees to notify Director of any changes in ownership interest greater than thirty percent (30%), or control of its business entity not less than sixty (60) days in advance of the effective date of such change. Notwithstanding any other remedies that are available to **CITY** under this **AGREEMENT**, any such change of ownership interest or control of its business entity may be grounds for termination of this **AGREEMENT** in accordance with Article VIII, Termination.

XIV. INDEPENDENT CONTRACTOR

14.1 **CONSULTANT** covenants and agrees that (s)he is an independent contractor and not an officer, agent, servant, or employee of **CITY**; that **CONSULTANT** shall have exclusive control of and exclusive right to control the details of the work performed hereunder and all persons performing same, and shall be responsible for the acts and omissions of its officers, agents, employees, contractors, and subcontractors; that the doctrine of respondeat superior shall not apply as between **CITY** and **CONSULTANT**, its officers, agents, employees, contractors, and subcontractors, and nothing herein shall be construed as creating a partnership or joint enterprise between **CITY** and **CONSULTANT**.

14.2 No Third Party Beneficiaries - For purposes of this **AGREEMENT**, including its intended operation and effect, the Parties specifically agree and **CONTRACT** that: (1) this **AGREEMENT** only affects matters/disputes between the Parties to this **AGREEMENT**, and is in no way intended by the Parties to benefit or otherwise affect any third person or entity, notwithstanding the fact that such third person or entities may be in a contractual relationship with **CITY** or **CONSULTANT** or both, or that such third parties may benefit incidentally by this **AGREEMENT**; and (2) the terms of this **AGREEMENT** are not intended to release, either by contract or operation of law, any third person or entity from obligations owing by them to either **CITY** or **CONSULTANT**.

XV. EQUAL EMPLOYMENT OPPORTUNITY

CONSULTANT shall not engage in employment practices which have the effect of discriminating against any employee or applicant for employment, and, will take affirmative steps to ensure that applicants are employed and employees are treated during employment without regard to their race, color, religion, national origin, sex, age, handicap, or political belief or affiliation. Specifically, **CONSULTANT** agrees to abide by all applicable provisions of San Antonio City ordinance number 69403 on file in the City Clerk's office.

XVI. SBEDA REQUIREMENTS

16.1 **CONSULTANT** hereby acknowledges that it is the policy of the **CITY** of San Antonio to assist in increasing the competitiveness and qualifications of small ("SBE"), women ("WBE"), handicapped and minority-owned business ("MBE") enterprises in order to afford greater opportunities for obtaining and participating in contracts, related subcontracts, and leases and concessions awarded by **CITY**. This policy and its implementation is known as the Small Business Economic Development Advocacy Program (hereinafter referred to as "SBEDA Program").

16.2 **CONSULTANT** agrees to implement the plan submitted in **CONSULTANT's** response to **CITY's** Request for Interest Statement under the SBEDA Program for Small, Minority and Women-owned Business Participation in this **AGREEMENT**, thereby meeting the percentages for participation of those groups as submitted therein. **CONSULTANT** agrees to be in full compliance with this article by meeting the percentages listed in **CONSULTANT's** Interest Statement no later than 60 days from the date of execution of this **AGREEMENT**, and to remain in compliance throughout the term of this **AGREEMENT**. **CONSULTANT** further agrees to continue to make every effort to utilize businesses for subcontracting and supplying during the duration of this **AGREEMENT**, as may be approved pursuant to this **AGREEMENT**, that will meet the percentages submitted in **CONSULTANT's** Interest Statement. Changes in contract value by changes in work orders, **AGREEMENT** amendments, or use of contract alternatives, which result in an increase in the value of the **AGREEMENT** by 10% or greater require the **CONSULTANT** to increase its use of business enterprises described in this section, if such is necessary to maintain the same percentages as exist in **CONSULTANT's** Interest Statement. However, the delegation of any duties hereunder by any means must be approved by **CITY** as stated herein.

16.3 **CONSULTANT** shall maintain records showing all contracts, subcontracts, and supplier awards to SBE/MBE/WBE's. **CONSULTANT** shall submit annual reports to **CITY's** Department of Economic Development, identifying the above activity and other efforts at increasing SBE/MBE/WBE participation in the **AGREEMENT**. Further, such records shall be open to inspection by **CITY** or its authorized agent at all reasonable times. Should **CITY** find that **CONSULTANT** is not in compliance with this article, **CITY** shall give notice of non-compliance to **CONSULTANT**. **CONSULTANT** shall have 30 calendar days to correct any and all deficiencies in compliance with this article. Failure to comply with this article and/or to correct any deficiencies within the time allotted shall be considered a material breach of this **AGREEMENT** and may subject **CONSULTANT** to any of the penalties listed in **CITY** of San Antonio Ordinance No. 77758, at **CITY's** option. Further, such failure may be considered a default for which **CITY** may terminate this **AGREEMENT** in accordance with Article VIII, Termination.

16.4 **CONSULTANT** shall appoint a representative of its company to administer and coordinate its efforts to carry out these requirements.

16.5 In all events, **CONSULTANT** shall comply with the **CITY's** Small, Business Economic Development Advocacy Program, contained in San Antonio Ordinance No. 77758, and the amendments thereto. Said ordinances are incorporated herein for all purposes, as if fully set forth herein.

16.6 It is **CITY's** understanding, and this **AGREEMENT** is made in reliance thereon, that **CONSULTANT**, in the performance of services required hereunder, will use the subcontractor(s) listed in its response to **CITY's** Request for Interest Statement.

16.7 Any work or services subcontracted by **CONSULTANT** shall be by written contract, and unless specific waiver is granted in writing by **CITY**, shall be subject by its terms to each and every provision of this **AGREEMENT**. Compliance by subcontractor with the provisions of said contract shall be the responsibility of **CONSULTANT**.

16.8 **CITY** shall in no event be obligated to any third party, including any subcontractor of **CONSULTANT**, for performance or services or payment of fees.

XVII. ESTIMATES OF COST

Because **CONSULTANT** has no control over the cost of construction labor, materials or equipment or over the construction contractor's methods of determining prices, or over competitive bidding or market conditions, **CONSULTANT's** opinions of probable construction cost provided herein shall be made on the basis of **CONSULTANT's** experience and qualifications and represent **CONSULTANT's** best judgment as a design professional familiar with the construction industry. **CONSULTANT** cannot and does not guarantee that proposals, bids or the construction cost will not vary from opinions of probable cost prepared by **CONSULTANT**.

XVIII. NOTICES

Unless otherwise expressly provided elsewhere in this **AGREEMENT**, any election, notice or communication required or permitted to be given under this **AGREEMENT** shall be in writing and deemed to have been duly given if and when delivered personally (with receipt acknowledged), or on receipt after mailing the same by certified mail, return receipt request with proper postage prepaid, or three (3) days after mailing the same by first class U.S. mail, postage prepaid (in accordance with the "Mailbox Rule"), or when sent by a national commercial courier service (such as Federal Express or DHL Worldwide Express) for expedited delivery to be confirmed in writing by such courier.

If intended for CITY, to:

City of San Antonio
Public Works Department
Attn: Samuel Hutchins, P.E.
P.O. Box 839966
San Antonio, Texas 78283-3966

If intended for CONSULTANT, to:

HNTB Corporation
Attn: Thomas D. Ellis, P.E.
85 NE Loop 410, Suite 304
San Antonio, Texas 78216-5866

XIX. INTEREST IN CITY CONTRACTS PROHIBITED

19.1 **CONSULTANT** acknowledges that it is informed that the Charter of the City of San Antonio and its Ethics Code prohibit a City officer or employee, as those terms are defined in the Ethics Code, from having a financial interest in any contract with **CITY** or any **CITY** agency such as **CITY** owned utilities. An officer or employee has a "prohibited financial interest" in a contract with **CITY** or in the sale to **CITY** of land, materials, supplies or service, if any of the following individual(s) or entities is a party to the contract or sale: a **CITY** officer or employee;

his parent, child or spouse; a business entity in which the officer or employee, or his parent, child or spouse owns ten (10) percent or more of the voting stock or shares of the business entity, or ten (10) percent or more of the fair market value of the business entity; a business entity in which any individual or entity above listed is a subcontractor on a **CITY** contract, a partner or a parent or subsidiary business entity.

19.2 **CONSULTANT** warrants and certifies, and this **AGREEMENT** is made in reliance thereon, that it, its officers, employees and agents are neither officers nor employees of **CITY**. **CONSULTANT** further warrants and certifies that it has tendered to **CITY** a Discretionary Contracts Disclosure Statement in compliance with **CITY's** Ethics Code.

XX. SOLICITATION

CONSULTANT warrants and represents that he has not employed or retained any company or person, other than a bona fide employee working solely for **CONSULTANT**, to solicit or secure this **AGREEMENT**, nor paid or agreed to pay any company or person, other than a bona fide employee working solely for **CONSULTANT**, any fee, commission, percentage, brokerage fee, gift, or any other consideration, contingent upon or resulting from the award or making of this **AGREEMENT**. This representation constitutes a substantial part of the consideration for the making of this **AGREEMENT**.

XXI. CONTRACT CONSTRUCTION

All parties have participated fully in the review and revision of this **AGREEMENT**. Any rule of construction to the effect that ambiguities are to be resolved against the drafting party shall not apply to the interpretation of this **AGREEMENT**.

XXII. FAMILIARITY WITH LAW AND CONTRACT TERMS

CONSULTANT represents that, prior to signing this **AGREEMENT**, **CONSULTANT** has become thoroughly acquainted with all matters relating to the performance of this **AGREEMENT**, all applicable laws, and all of the terms and conditions of this **AGREEMENT**.

XXIII. APPLICABLE LAW

This **AGREEMENT** shall be governed by and construed in accordance with the laws and court decisions of the State of Texas.

XXIV. VENUE

The obligations of the parties to this **AGREEMENT** shall be performable in San Antonio, Bexar County, Texas, and if legal action, such as civil litigation, is necessary in connection therewith, exclusive venue shall lie in Bexar County, Texas.

XXV. SEVERABILITY

In the event any one or more paragraphs or portions of this **AGREEMENT** are held invalid or unenforceable, such shall not affect, impair or invalidate the remaining portions of this **AGREEMENT**, but such shall be confined to the specific section, sentences, clauses or portions of this **AGREEMENT** held invalid or unenforceable.

XVI. FORCE MAJEURE

In the event that performance by either party of any of its' obligations or undertakings hereunder shall be interrupted or delayed by any occurrence and not occasioned by the conduct of either party hereto, whether such occurrence be an act of God or the common enemy or the result of war, riot, civil commotion, sovereign conduct, or the act or conduct of any person or persons not party or privy hereto, then such party shall be excused from performance for a period of time as is reasonably necessary after such occurrence to remedy the effects thereof, and each party shall bear the cost of any expense it may incur due to the occurrence.

XVII. SUCCESSORS

This **AGREEMENT** shall be binding upon and inure to the benefit of the parties hereto and their respective heirs, executors, administrators, successors and, except as otherwise provided in this **AGREEMENT**, their assigns.

XXVIII. NON-WAIVER OF PERFORMANCE

28.1 A waiver by either Party of a breach of any of the terms, conditions, covenants or guarantees of this **AGREEMENT** shall not be construed or held to be a waiver of any succeeding or preceding breach of the same or any other term, condition, covenant or guarantee herein contained. Further, any failure of either Party to insist in any one or more cases upon the strict performance of any of the covenants of this **AGREEMENT**, or to exercise any option herein contained, shall in no event be construed as a waiver or relinquishment for the future of such covenant or option. In fact, no waiver, change, modification or discharge by either party hereto of any provision of this **AGREEMENT** shall be deemed to have been made or shall be effective unless expressed in writing and signed by the party to be charged. In case of **CITY**, such changes must be approved by the San Antonio City Council.

28.2 No act or omission by a Party shall in any manner impair or prejudice any right, power, privilege, or remedy available to that Party hereunder or by law or in equity, such rights, powers, privileges, or remedies to be always specifically preserved hereby.

XXIX. PARAGRAPH HEADINGS

The headings of this **AGREEMENT** are for the convenience of reference only and shall not affect in any manner any of the terms and conditions hereof.

XXX. LEGAL AUTHORITY

The signer of this **AGREEMENT** for **CITY** and **CONSULTANT** each represents, warrants, assures and guarantees that he has full legal authority to execute this **AGREEMENT** on behalf of **CITY** and **CONSULTANT** respectively, and to bind **CITY** and **CONSULTANT** to all of the terms, conditions, provisions and obligations herein contained.

XXXI. INCORPORATION OF ATTACHMENTS

CONSULTANT understands and agrees that all attachments, including appendices thereto, referred to in this **AGREEMENT** are intended to be and hereby are incorporated herein and specifically made a part of this **AGREEMENT** for all purposes. Said attachments are as follows:

ATTACHMENT "A" (Scope of Services)

ATTACHMENT "B" – (Production Schedule)

ATTACHMENT "C" – (**CONSULTANT's** Fee Proposal and SBEDA Participation Statement from **CONSULTANT's** Interest Statement)

In the event of a conflict or inconsistency between any attachment and the terms of this **AGREEMENT**, the terms of this **AGREEMENT** shall govern and prevail. In the event of a conflict or inconsistency between Attachment "A" and Attachments "B" and/or Attachment "C", the terms of Attachment "A" shall control over the terms of Attachment "B" and Attachment "C". In the event of a conflict or inconsistency between Attachment "B" and Attachment "C", the terms of Attachment "B" shall control over the terms of Attachment "C".

XXXII. ENTIRE AGREEMENT

32.1 This **AGREEMENT**, together with its authorizing ordinance and Attachments, as listed in Article XXXI, Incorporation of Attachments, embodies the complete **AGREEMENT** of the Parties hereto, superseding all oral or written previous and contemporary agreements between the Parties relating to matters herein; and except as otherwise provided herein, cannot be modified without written consent of the parties and approved by ordinance passed by the San Antonio City Council.

32.2 It is understood and agreed by the Parties hereto that changes in local, state or federal rules, regulations or laws applicable hereto may occur during the term of this **AGREEMENT** and that any such changes shall be automatically incorporated into this **AGREEMENT** without written amendment hereto, and shall become a part hereof as of the effective date of the rule, regulation or law.


EXECUTED ON THIS, THE 30th DAY OF March, 2006

CITY OF SAN ANTONIO

CONSULTANT:


CITY MANAGER

Thomas D. Ellis, P.E.
Vice President

 3-30-06
CITY CLERK DATE

APPROVED AS TO FORM:


CITY ATTORNEY